

December 1933

## Equity--Laches--Statute of Limitations

Julius Cohen

*West Virginia University College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Estates and Trusts Commons](#)

---

### Recommended Citation

Julius Cohen, *Equity--Laches--Statute of Limitations*, 40 W. Va. L. Rev. (1933).

Available at: <https://researchrepository.wvu.edu/wvlr/vol40/iss1/14>

This Recent Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

EQUITY — LACHES — STATUTE OF LIMITATIONS. — W in 1912 left the following memorandum to defendant:

"This is to certify (*sic*) that I have got and used to the amount of six hundred and forty two dollars and forty five cts. from Irven Milam. I further agree that if I should have any interest in the A. B. Milam estate that my interest shall stand good to Irven Milam for the amount of six hundred and forty two dollars and forty five cts. for value received with interest from date".

Six years later, the father died, leaving part of his estate to W, sufficient to pay off his debt to the defendant. W absenting himself for the statutory period, was presumed dead. In 1930, an administrator of W's personal estate was appointed. By authority of the statute, said administrator instituted a suit in equity, in which defendant was a creditor. From an adverse decree, defendant appealed. Plaintiff urged that the debt was barred by the Statute of Limitations. The decree was reversed, however, on the grounds that the memorandum, creating a "trust or lien", was purely a matter of equitable nature and was unaffected by the Statute of Limitations. *Lewis v. Milam*.<sup>1</sup>

The court could have disposed of the bar of the Statute of Limitations by showing that it had not yet expired at the commencement of the suit.<sup>2</sup> But, assuming hypothetically that sufficient time had actually elapsed for the statute to become effective, and that more than a technical right of action was available,<sup>3</sup> the rationale of the court merits criticism.

The memorandum lacks the element of a trust, either express,<sup>4</sup>

<sup>1</sup> 169 S. E. 70 (W. Va. 1933).

<sup>2</sup> W. VA. CODE ANN. (Barnes, 1923) c. 104, § 17; W. VA. CODE ANN. (Michie, 1932) § 5408: "If a person die before the time at which any right mentioned in this article would have accrued to him if he had continued alive, and there would be an interval of more than five years between the death of such person and the qualification of his personal representative, such personal representative shall, for the purposes of this article be deemed to have qualified on the last day of such five years." This statute has been interpreted to mean that the Statute of Limitations will not apply until the personal representative has qualified, or upon failure to qualify, it is to be counted from the end of five years. *Crawford v. Turner*, 67 W. Va. 564, 68 S. E. 179 (1910). The difficulty in applying the Statute of Limitations is in determining when W actually died, apart from the fact of death. If one computes actual death from the end of the seven year statutory span, W would have died in 1919, and the administrator presumed appointed in 1924. The statute would not then apply until 1934.

<sup>3</sup> The unusual circumstances of the case would give the defendant only a technical right of action because there was no one against whom suit could be brought within the intermediate time.

<sup>4</sup> PERRY ON TRUSTS AND TRUSTEES (7th ed. 1929) § 24.

constructive,<sup>5</sup> or resulting.<sup>6</sup> It more clearly resembles an equitable lien, arising from a specifically enforceable executory contract to secure a past debt.<sup>7</sup> Although W's debt may be subsumed under the category of past consideration, it has been held sufficient to give validity to a contract.<sup>8</sup> This clears the hurdle of sufficient consideration demanded by equity before it will enforce an executory agreement.<sup>9</sup> Disregarding the effectiveness of the remedy, it would seem that an action at law on the contract was available.

In cases in which equity and law have "concurrent jurisdiction", it has been recognized that equity will apply the Statute of Limitations by analogy,<sup>10</sup> and avoid the wider application of laches.<sup>11</sup> Concurrent jurisdiction does not necessarily mean that equity and law will give identical relief in a particular case. It embraces cases in which the relief given in equity is of superior calibre to that given at law.<sup>12</sup>

<sup>5</sup> *Ibid.* § 27.

<sup>6</sup> *Ibid.* §§ 124, 125.

<sup>7</sup> POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) §§ 1236, 1237; JONES ON LIENS (3rd ed. 1914) §§ 27, 42.

<sup>8</sup> WILLISTON ON CONTRACTS (1920) § 142.

<sup>9</sup> POMEROY, *op. cit. supra* § 1293.

<sup>10</sup> POMEROY, *op. cit. supra* §§ 419, 139; WALSH, EQUITY (1930) 474; Clark v. Gruber, 74 W. Va. 533, 82 S. E. 338 (1914); Crawford's Adm'r v. Turner's Adm'r, 67 W. Va. 564, 68 S. E. 179 (1910); Mace v. Collieries Corp., 111 W. Va. 532, 163 S. E. 37 (1932); Wilsons v. Harper, 25 W. Va. 179 (1884); Maxwell v. Wilson, 54 W. Va. 495, 46 S. E. 349 (1903); Newberger v. Wells and Leonard, 51 W. Va. 624, 42 S. E. 625 (1901).

<sup>11</sup> Sibley v. Stacey, 53 W. Va. 292, 44 S. E. 420 (1903).

<sup>12</sup> In Newberger v. Wells, *supra* n. 10, plaintiff presented a bill in equity to correct a mistake of quantity of land named in a deed, and asked for a money decree for the remainder. The land had been deeded with a general warranty. Equity took jurisdiction on the grounds of mistake, despite the fact that no lien for purchase money was reserved in the deed, as required by statute. It was held that in the absence of fraud, the jurisdiction being concurrent, the Statute of Limitations applied. To show the inadequacy of the legal remedy the court said: "The mistake or fraud has therefore caused them to do that which materially affected their interest very much to their detriment. It has converted their property into a mere unsecured claim for money, and if the defendant in this case were insolvent, the result would be irreparable loss and injury to them." *Ibid.* p. 632. In Clark v. Gruber, *supra* n. 10, plaintiff furnished decedents with boarding and lodging. No agreement was made in decedent's lifetime to pay for the services because plaintiff, being a son-in-law, expected to receive recompense through decedent's will. But decedent remarried, made a new will, and omitted the compensation that plaintiff sought. Plaintiff brought a creditor's bill in equity, seeking a settlement of the accounts of the administratrix. From the facts of the case, the court implied a contract to pay for the board and lodging. The court decided that "equity follows the law literally in applying the statute of limitations," but that the contract being a "continuing one", the statutory limit had not yet elapsed. It would seem that the legal remedy would have been inadequate, for the facts disclosed that there were not sufficient personal assets to pay the plaintiff's debt.

The principal case, not within the exclusive realm of equity,<sup>13</sup> could more clearly fit into the niche of "concurrent jurisdiction". Shorn of its factual complications which allow only a technical right of action at law, there is sufficient ground to warrant analogous application of the Statute of Limitations. To deny its application would lead to the anomalous situation of giving more protection to an incomplete mortgage, than a complete one not based on any contingent future interest.

One might venture to offer the "concurrent jurisdiction" cases as one example indicative of the breakdown of the rigid breach between law and equity.

—JULIUS COHEN.

---

INJUNCTIONS — RESTRAINING UNLICENSED PRACTICE OF MEDICINE. — There is a statute which makes the practice of medicine without complying to licensing requirements a misdemeanor. P, in interest of himself and others similarly situated was awarded an injunction to restrain D in his unlawful practice. The lower court sustained a demurrer to the bill and certified its ruling for review. The Supreme Court simply calls P's license a franchise, a valuable property interest, which he can protect by enjoining one without a license. *Sloan v. Mitchell*.<sup>1</sup>

The court reaches a wholesome result which can well be supported although there is some contrary authority.<sup>2</sup>

---

<sup>13</sup> One of the most typical examples in which equity takes exclusive jurisdiction is in the case of a trust. Emphasis is given to its "purely equitable" character, and the Statute of Limitations will not apply by analogy. *Patrick v. Stark*, 62 W. Va. 606, 59 S. E. 606 (1907); *Currence v. Ward*, 43 W. Va. 367, 27 S. E. 329 (1897); *Heiskell v. Powell*, 23 W. Va. 717 (1883); *Marinaek v. Blackburn*, 93 W. Va. 585, 116 S. E. 7 (1923); *POMEROY, op. cit. supra* § 419.

<sup>14</sup> Pound, *Decadence of Equity* (1905) 5 COL. L. REV. 20, at p. 23: "The anti-legal element has come to be a minimum once more, a work of liberalization being accomplished, the system whereby it was brought about remains merely as an accident of judicial administration, requiring men for historical reasons to seek relief here rather than there, or in this way rather than that, without sensibly affecting the substance or rules applied."

<sup>1</sup> 168 S. E. 800 (W. Va. 1933).

<sup>2</sup> *Drummond v. Rowe*, 155 Va. 725, 156 S. E. 442 (1931). (The court refused an injunction to P, a veterinary, against D who had not taken the examination required by statute.) *Healy v. Sidone*, 127 Atl. 520 (N. J. 1923). (The statute was not passed for benefit of P.) *Merz v. Murchison*, 30 Ohio Cir. Ct. R. 646 (1908). (No injunction will issue where P only urges a diminution of profits by means of unlawful competition. There is